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FILED
JUL 28 1982
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No. 81-2379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILLIP M. PROCTOR, *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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This brief is submitted on behalf of respondent Liberty Mutual Insurance Company ("Liberty Mutual")* in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 16, 1982.

*The following are subsidiaries and affiliates of Liberty Mutual: Liberty Mutual Fire Insurance Company; Liberty Life Assurance Company of Boston; Liberty International Agency, Inc.; Liberty Mutual Insurance Company (Massachusetts) Limited; Helmsman (Underwriting) Limited; Liberty Mutual (Bermuda) Ltd.; Liberty Mutual Management (Bermuda) Ltd.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that an alleged horizontal agreement among insurance companies regarding a "common formula" for reimbursing their insureds for automobile damage repair work is part of the "business of insurance" under the McCarran-Ferguson Act?

2. Whether the Court of Appeals erred in holding that, after 3 years of discovery, the evidence adduced by petitioners to support their allegation of an agreement among defendants failed to raise a material issue of fact sufficient to defeat the grant of summary judgment?

STATEMENT OF THE CASE

This action was originally begun in the United States District Court for the District of Columbia in 1972. The action was brought by four automobile repair shops, charging the five defendant insurance companies with violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Although some claims were dropped and theories shifted as the litigation progressed, the core of plaintiffs' allegations was that the defendant insurance companies had agreed among themselves to pay their insureds' claims for automobile damage repairs according to a common formula based on a "prevailing hourly labor rate" and other factors. App. at 4.[1]

After three years of extensive discovery, the defendants moved for summary judgment on the grounds that plantiffs had failed to adduce any evidence to support the

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[1] The opinion of the Court of Appeals below is reprinted as Appendix A to the petition for certiorari. Citations herein to that opinion will be to the Appendix ("App.").

existence of the agreements alleged and that, in any event, the agreements alleged were exempted from the federal antitrust laws by virtue of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. The district court granted summary judgment to the defendants on the McCarran-Ferguson ground (406 F. Supp. 27 (D.D.C. 1975)), and the Court of Appeals affirmed (561 F.2d 262 (D.C. Cir. 1977)).

Subsequent to the Court of Appeals' affirmance of summary judgment, this Court announced its decision in another McCarran-Ferguson Act case, *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979). This Court then granted certiorari in the present case and remanded the case to the Court of Appeals "for further consideration in light of [*Royal Drug*]." 440 U.S. 942 (1979). Upon remand from this Court, the Court of Appeals, in turn, remanded the case to the district court.

In the district court on remand, the defendants filed renewed motions for summary judgment. The district court again granted summary judgment (1980-81 Trade Cas. (CCH) ¶ 63,591 (D.D.C. 1980)), and the Court of Appeals again affirmed (1982-1 Trade Cas. (CCH) ¶ 64,606 (D.C. Cir. 1982)). In affirming, the Court of Appeals held first that the alleged horizontal agreement among the defendant insurance companies relating to their payment of their insureds' automobile damage claims was exempted from the antitrust laws under the McCarran-Ferguson Act. App. at 19-34.[2] Second, as a

[2] The Court of Appeals also ruled on plaintiffs' claims with respect to certain alleged vertical arrangements with so-called "captive" repair shops. (App. at 56-63). As the petition for certiorari does not challenge this ruling of the Court of Appeals, it is not addressed herein.

separate ground for its decision, the Court of Appeals held that, even if the alleged agreement were not exempt, plaintiffs had failed to adduce any evidence to support their allegation that such an agreement actually existed. App. at 35-56.

Plaintiffs' Petition for Rehearing was denied and their suggestion for Rehearing *En Banc* was similarly denied by the Court of Appeals in per curiam orders dated April 18, 1982. Plaintiffs then filed the present petition seeking a writ of certiorari to review the Court of Appeals' decision.

REASONS FOR DENYING THE PETITION

The Court of Appeals below concluded, as one of the two alternative grounds for its decision, that the agreement alleged by petitioners, even if it were proven, was exempt from the federal antitrust laws by virtue of the McCarran-Ferguson Act. This ground for the court's decision provides no basis for the writ of certiorari sought by petitioners, for in so ruling the Court of Appeals, for the second time, painstakingly considered the controlling precedents and ruled in a manner consistent with this Court's decisions in the area. Further, the Court below decided the question in a manner consistent with other courts that have addressed closely similar questions, including most notably the Seventh Circuit's decision in a virtually identical case which this Court earlier this term refused to review on certiorari. *Quality Auto Body, Inc.* v. *Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1717 (1982).

The other ground for the Court of Appeals' decision was that, despite 10 years of litigation including years of extensive discovery, petitioners had simply failed to adduce any credible evidence to support their allegation

of a claimed horizontal agreement among the defendants. This holding applied commonplace, well-established principles governing summary judgment and is an independent and sufficient alternative ground for the Court of Appeals' decision, quite apart from any McCarran-Ferguson issues. This alternative ground does not even remotely present the kind of "special and important reasons" required to justify discretionary review by this Court on writ of certiorari. *See* Supreme Court Rule 17.1.

I.

The Court Of Appeals Properly Concluded That The Alleged Horizontal Agreement Among Insurance Companies Was Within The McCarran-Ferguson Act Exemption

The district court and the Court of Appeals below each considered twice the defendants' McCarran-Ferguson Act defense—once before *Royal Drug* and once after that decision. Both courts concluded both times that if the agreement alleged by petitioners existed, it was part of the "business of insurance" regulated by the states and exempted from the federal antitrust laws by the McCarran-Ferguson Act.

The basic alleged agreement among the defendant insurance companies relates to their reimbursement of their insureds for the cost of automobile damage repair work. Liberty Mutual, for example, has a "direct appraisal system" for payment of damages claimed by its insureds under automobile insurance policies. Under this system, Liberty Mutual itself appraises the damage to the vehicle and mails the appraisal and a check directly to the insured. The insured is then free to have the repair work done by the repair shop of his or her choice on terms agreed to between the shop and the insured. Although other companies have different systems, petitioners

alleged nonetheless that the companies agreed among themselves to use a common formula to calculate reimbursement, including a prevailing hourly labor rate and other factors. App. at 4.

In concluding that such an agreement, if it existed, was within the "business of insurance" under McCarran-Ferguson, the Court noted that *Royal Drug*, in contrast, involved a vertical agreement between an insurance company and persons outside the insurance industry. The agreement alleged here, however, was purely a horizontal intra-industry agreement. In focusing on this factor, the court below not only properly construed *Royal Drug*, but also anticipated this Court's decision in *Union Labor Life Insurance Co.* v. *Pireno*, 50 U.S.L.W. 4911 (June 28, 1982). In *Pireno*, this Court re-emphasized that the McCarran-Ferguson Act was "intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks" (50 U.S.L.W. at 4914 (emphasis in original)), and that an important factor in determining the applicability of the Act is whether the agreement is "limited to entities within the insurance industry " (*Id.* at 4913).

Thus, contrary to petitioners' assertion, the decision below is in no way in conflict with *Royal Drug*. It is fully in accord with that decision, as well as others by this Court construing the Act.

The decision below also accords with other courts' decisions dealing with similar allegations. For example, the Seventh Circuit's decision in *Quality Auto Body, Inc.* v. *Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1717 (1982), involved allegations of an intra-industry agreement "virtually identical to the horizontal agreement challenged in this case." App. at 25. The Seventh Circuit, like the court here, concluded that such an agreement was exempt under McCarran-

Ferguson. Other courts have consistently reached the same result in ruling on closely similar allegations. *Workman* v. *State Farm Mutual Automobile Insurance Co.*, 520 F. Supp. 610 (N.D. Cal. 1981); *Nationwide Mutual Insurance Co.* v. *Automotive Service Councils*, 1981-1 Trade Cas. (CCH) ¶ 63,958 (D. Del. 1981); *DeBonaventura* v. *Nationwide Mutual Insurance Co.*, 419 A.2d 942 (Del. Ch. Ct. 1980), *aff'd*, 428 A.2d 1151 (Del. Sup. Ct. 1981). *See also*, *Chick's Auto Body* v. *State Farm Mutual Automobile Insurance Co.*, 168 N.J. Super. 68, 401 A.2d 722 (Super. Ct. Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (Super. Ct. App. Div. 1980).

In sum, the decision of the Court of Appeals on the McCarran-Ferguson question was a straight-forward statutory interpretation made in accordance with the principles established by this Court in *Royal Drug* and other decisions, and fully consistent with decisions of other courts on the same question. Such a decision does not warrant review on writ of certiorari.

II.

The Court Of Appeals' Holding That There Was No Evidence Of the Alleged Agreement Correctly Applied Well Established Principles Of Summary Judgment

Although the Court of Appeals addressed and resolved the McCarran-Ferguson Act question, that ground for its decision was not really necessary since the court also held that there was no evidence to support petitioners' claim of an agreement or conspiracy among the defendants. Petitioners invoke the oft-repeated cautions against misuse of summary procedures, especially in antitrust cases (Petition at 13), but such arguments are ill-suited to this litigation.

This is not a case in which an antitrust plaintiff was dismissed on the basis of bare pleadings or denied the full opportunity to seek evidence to support its claim through discovery. To the contrary, plaintiffs engaged in 3 years of extensive discovery, probing every imaginable avenue for evidence to support their claim, virtually without limitation. Motions for Summary Judgment were filed only *after* these 3 years of discovery and *after* petitioners advised the district court that they had "substantially concluded discovery" and that the parties should "proceed with the filing of such dispositive motions as they deem desirable."[3]

Nor can petitioners now claim for the first time that they were somehow prejudiced by additional documents produced by Liberty Mutual more than 2 years ago, in April 1980. Those documents were produced a month before petitioners responded to the renewed Motions for Summary Judgment and 6 months before the district court ruled. At no time did petitioners request or even suggest any need for additional discovery.

Nor can petitioners seriously contend that the Court of Appeals could not rule on this issue, simply because the district court's decision was not based on this ground. As the Court of Appeals notes, lack of evidence of a conspiracy was fully argued and reargued by the parties (App. at 36-37), and the Court of Appeals' discretion to rule on issues not addressed by the district court is too well established to be subject to dispute. *E.g.*, *Singleton*

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[3] Petitioners' letter to the district court, dated January 17, 1975, is included as Exhibit A to the Opposition brief filed herein by respondents Nationwide, Travelers and State Farm.

v. *Wulff*, 428 U.S. 106, 121 (1976); *United States* v. *General Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975).

After 10 years of litigation, the Court of Appeals was certainly entitled to address and resolve once and for all the issues raised. Indeed, fairness to the parties and the interests of judicial economy demanded no less. It manifestly is not the law that anyone who files an antitrust complaint is automatically entitled to proceed to a full trial, despite the absence of any probative evidence to support their claim even after exhaustive discovery. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968). Rule 56, Fed. R. Civ. P., governs the grant of summary judgment in all civil actions in the federal courts, and the court below followed the well-established standards under that rule.

The Court of Appeals properly recognized this case for exactly what it is: a seemingly interminable lawsuit based on an imaginary conspiracy, unsupported by any evidence, and, at that, based on a mistaken legal theory. That such a case could drag on for a decade is a cause for concern. That the Court of Appeals sought finally to put it to rest was both proper and appropriate.

CONCLUSION

For the foregoing reasons, respondent Liberty Mutual respectfully urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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